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Opinion following order vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHAN NIZAR HAI, Defendant and Appellant.	B281566 (Los Angeles County Super. Ct. No. GA098808)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed in part and remanded with directions.

Julie Caleca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

This case arises from a vehicle accident in which the appellant Shan Nizar Hai drove a vehicle into a restaurant and subsequently struck two of the restaurant's employees with his vehicle before leaving the scene. Appellant challenges his judgment of conviction for hit-and-run driving resulting in injury to another person (Veh. Code, § 20001, subds. (a), (b)(1)), hit-and- run driving resulting in property damage (Veh. Code, § 20002), and two counts of assault with a deadly weapon (vehicle) (Pen. Code, § 245, subd. (a)(1)). He argues the trial court prejudicially abused its discretion by admitting testimony that, at the time of the vehicle crash, he appeared to witnesses to be intoxicated and that his person and vehicle smelled of marijuana. He also argues the trial court erred in refusing his request to provide the jury with an instruction on self-defense. We disagree with these contentions and affirm.

In supplemental briefing, appellant argues the matter should be remanded for the trial court to consider whether appellant's prior serious felony enhancement should be stricken pursuant to the court's newly granted discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1-2 (S.B. 1393). The Attorney General agrees, as do we, that remand for this limited purpose is warranted.

FACTUAL AND PROCEDURAL SUMMARY

Following a May 2016 vehicular accident in which appellant was the driver, he was charged by information in July 2016 with driving under the influence (DUI) within 10 years of a previous felony DUI (former Veh. Code, §§ 23152, subd. (e), 23550.5), causing injury while driving under the influence within 10 years of a previous DUI (Veh. Code, §§ 23153, subd. (e), 23560), driving under the influence when his driving privilege was suspended or revoked (Veh. Code, § 14601.2, subd. (a)), hit-and-run driving resulting in injury to a person (Veh. Code, § 20001, subd. (b)(1)), and hit-and-run driving resulting in property damage (Veh. Code, § 20002). The information was later amended to add two counts of assault with a deadly weapon (vehicle) under Penal Code section 245, subdivision (a)(1). All DUI-related charges were later dismissed. Appellant pleaded not guilty to all remaining counts. The case was called for a jury trial in January 2017.

During the prosecution's presentation of its case at trial, three employees of a fast-food restaurant in the city of Alhambra, Amalia Ortiz, Oscar Lopez, and Richard Morales, described events they witnessed outside the restaurant on May 7, 2016 as follows. Lopez stated that around midnight, as he was throwing away trash, he noticed the odor of marijuana emanating from a white Toyota Prius parked outside the restaurant. Approximately 30 minutes later, Lopez, Ortiz, and Morales heard a loud sound and saw a white Prius crashed into the front door of the restaurant. The three employees went outside to check on the vehicle's passengers.

The driver of the vehicle, identified as appellant, appeared unconscious. Lopez asked appellant repeatedly if he was okay and received no response. Lopez and Morales smelled marijuana. Morales stated appellant appeared to be "under the influence." Lopez testified he was concerned for his safety and the safety of the other employees.

A passenger, Hector Ayala, exited the vehicle and tried to wake appellant. Ayala walked behind the vehicle and attempted to dislodge a pole on which the vehicle was stuck. Appellant woke up and attempted to reverse the vehicle. Morales yelled at Ayala to move out of the way of the vehicle, afraid that it would hit him, but he did not. Morales told appellant twice to turn off the vehicle.

Meanwhile, Ortiz called 911. The 911 operator told her to tell appellant not to leave the scene, and she followed the instruction. As appellant continued to attempt to reverse, Morales and Lopez opened the vehicle door nearest the driver's seat and attempted to press the button to turn the vehicle off. Ayala moved out of the way of the vehicle. Appellant stepped on the gas, causing the vehicle to shoot backwards while Morales's and Lopez's bodies were partially inside the vehicle. Morales and Lopez were pulled by the vehicle approximately 20 feet. Appellant then drove the vehicle forward and again hit Lopez and Morales with the vehicle's tires. Lopez fell and sustained a leg injury after the vehicle ran over it. Morales felt his ankle "crack" under the vehicle and began punching appellant in an attempt to stop him. There were three bystanders on a nearby sidewalk who had to back up to avoid being hit by the vehicle. Appellant then drove away. The vehicle crash and ensuing events as described above were captured by surveillance

video, which was played for the jury during trial.

Officer Michael Hennes testified that he arrived outside the restaurant around midnight on May 7, 2016. Ortiz pointed him towards a nearby parking structure into which she had seen appellant's vehicle enter. Hennes drove into the parking structure, where he saw a white Prius embedded against a wall. Hennes then approached the vehicle and smelled a strong odor of marijuana. He saw appellant emerge from the vehicle, which he noticed was damaged. He smelled marijuana on appellant's person. Appellant was detained.

During Officer Hennes' testimony, appellant's counsel objected to the introduction of testimony describing the odor of marijuana, arguing it was not relevant. The prosecution argued the testimony was relevant because it explained the motivation of the employees in intervening to stop appellant from driving away from the scene. The court overruled appellant's counsel's objection, stating:

"I mean, I guess the balance at this point becomes a 352 consideration. Given that marijuana is now legal in the State of California, it's a very minor issue. I mean, if the explanation is going to be, you know, [the witnesses] thought he may be smoking marijuana, we wanted to make sure he stopped, we wanted to make sure there wouldn't be any further accidents. If this officer corroborates those witnesses by saying, yes, I also smelled marijuana, I think that is relevant. I don't think the 352 considerations, given the fact that marijuana is legal now and was legal at the time if you had a medical marijuana card, it doesn't seem much of an issue. I don't think there's going to be any evidence of about who may have been smoking. . . . There is another person in the car, too, certainly, that could have been smoking marijuana as well or had access to it. I mean, it's not clear."

Later in Officer Hennes' testimony, the trial court specifically instructed the jury that there were no DUI or DUI-related charges against appellant. The court stated that questions about appellant's possible intoxication were not relevant to the case.

Testifying for the defense, Ayala stated appellant and he had not smoked marijuana on the night of May 7, 2016. He acknowledged that the vehicle smelled of marijuana. He stated appellant fell asleep in the parked

vehicle when the vehicle started to move. Ayala stated the employees who emerged from the restaurant following the crash became aggressive after appellant started to reverse the vehicle, cursing at appellant and punching him.

In rebuttal, the prosecution called police detective Jack Ng, who testified that he interviewed Ayala on the night of the vehicle crash. Ng stated Ayala told him he had attempted to stop appellant from backing out, but that appellant refused and struck Lopez and Morales with the vehicle.

Appellant's counsel requested a jury instruction on self- defense. The trial court stated that substantial evidence did not support the instruction since appellant struck Morales and Lopez with his vehicle before Morales punched him. The court allowed appellant's counsel to argue self-defense to the jury but refused to give a self-defense instruction.

In closing argument, the prosecution argued the three restaurant employees were motivated to intervene to stop appellant from leaving the scene because they believed he was unable to drive after smelling marijuana on his person and seeing him unconscious. The prosecution did not argue that appellant was under the influence of marijuana. Appellant's counsel argued to the jury that evidence of the odor of marijuana and appellant's appearance of being under the influence were not relevant to the charges against him, which did not include DUI. He also argued that Morales and Lopez escalated the situation by taking matters into their own hands. He argued appellant's actions were intended to prevent himself from harm. In rebuttal, the prosecution clarified that appellant had not been charged with a DUI and that evidence of marijuana was relevant only to the motivations of the witnesses. The jury was instructed to disregard any evidence rejected by the trial court.

The jury found appellant guilty of hit-and-run driving resulting in injury to another person, hit-and-run driving resulting in property damage, and two counts of assault with a deadly weapon (vehicle). Appellant's counsel moved for a new trial, arguing the court should have instructed the jury regarding self-defense and should not have admitted testimony regarding the odor of marijuana or appellant's appearance of intoxication. Appellant's counsel submitted a declaration detailing conversations he had with four

jurors following the verdict in which they indicated appellant's alleged marijuana use impacted the verdict. The trial court found the statements by jurors inadmissible under Evidence Code section 1150, subdivision (a). The trial court denied the motion for new trial.

Appellant was sentenced to the upper term of four years for the base count of assault with a deadly weapon (vehicle). That term was doubled by operation of law due to a prior strike pursuant to Penal Code section 667, subdivision (e)(1). Five years were added to that term pursuant to Penal Code section 667, subdivision (a). For the second count of assault with a deadly weapon (vehicle), the court divided the middle term by three, resulting in one year, which the court then doubled pursuant to Penal Code section 667, subdivision (e)(1). The trial court sentenced appellant to serve that two-year term consecutively, resulting in a total sentence of 15 years in state prison. Appellant's other sentences for hit and run driving were stayed. This appeal followed.

On June 6, 2018, we filed an opinion affirming the judgment. On November 8, 2018, appellant filed a motion to recall the remittitur and to file supplemental briefing on the ground that newly enacted S.B. 1393 gave the trial court discretion to strike the prior serious felony enhancement. Appellant asserted that the statutory amendment was retroactive to all cases, like his, which were not—or would not be—final as of the statutory amendment's effective date, January 1, 2019. We granted appellant's motion and recalled the remittitur, vacating our opinion to provide the parties an opportunity to submit supplemental briefing addressing the effect of S.B. 1393 on appellant's case.

DISCUSSION

I. The Trial Court Did Not Err In Admitting Marijuana-Related Testimony.

Appellant argues the trial court prejudicially erred in admitting testimony about the odor of marijuana emanating from his vehicle and person, and his appearance of intoxication. We disagree.

The trial court has broad discretion in determining the relevance of evidence under Evidence Code section 351. (*People v. Clark* (2011) 52 Cal.4th

856, 892.) It likewise has broad discretion to determine whether the risk of prejudice from the admission of evidence substantially outweighs its probative value under Evidence Code section 352. (*People v. Holford* (2012) 203 Cal.App.4th 155, 167.) A trial court's exercise of this discretion "'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*Id.* at p. 168.)

The trial court's determination that the challenged evidence was relevant was within its discretion. Under Evidence Code section 210, evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Appellant's theory of the case, which his counsel argued to the jury, was that Morales and Lopez escalated a simple vehicle crash into a dangerous confrontation by taking matters into their own hands. This argument placed Morales's and Lopez's motivations in contention, resulting in the relevance of their explanations about their behavior. The trial court also did not abuse its discretion in finding Officer Hennes' testimony regarding the odor of marijuana relevant; that testimony corroborated the testimony of Morales and Lopez, whose credibility was at issue. (See Evid. Code, § 210 [relevant evidence includes "evidence relevant to the credibility of a witness"].)

We find no prejudicial error in the trial court's determination that any prejudice resulting from the presentation of marijuana-related evidence did not substantially outweigh its probative value. The trial court weighed the probative value of the evidence—which it deemed high based on its relevance to the motivations and credibility of key witnesses—against the potential prejudicial effect of the evidence, which it deemed low based on the changing legal landscape with respect to marijuana and the possibility that Ayala had used marijuana in the vehicle without appellant. Referring to Evidence Code section 352, the court stated: "I don't think the 352 considerations, given the fact that marijuana is legal now and was legal at the time if you had a medical marijuana card, it doesn't seem much of an issue." Appellant argues that the court unreasonably underestimated the potential prejudicial effect of the marijuana-related evidence by considering the general legalization of marijuana rather than the continued criminalization of driving under the

influence of marijuana, since appellant was driving at the time of his offenses.

Even assuming that the court erred in admitting the marijuana-related testimony, any error was harmless beyond a reasonable doubt. Such error does not require reversal under either the federal *Chapman* or state *Watson* standards. (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal not required unless error affecting criminal defendant's constitutional rights cannot be proved harmless "beyond a reasonable doubt"]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required unless it is reasonably probable defendant would have obtained better result absent error].)

The court and counsel for both sides repeatedly made clear that appellant was not charged with DUI or DUI-related offenses and that the marijuana-related evidence was admitted only for the purpose of demonstrating the witnesses' motivations and credibility. The court explained to the jury that questions about appellant's intoxication were irrelevant to the trial. The jury was instructed to disregard evidence rejected by the trial court. Because we assume the jury is capable of following the instructions provided to it (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915), these instructions and clarifications were sufficient to cure any prejudice from the admission of the marijuana-related evidence.

Further, ample evidence demonstrated appellant's guilt apart from the marijuana-related testimony. (*People v. Jennings* (2010) 50 Cal.4th 616, 691 [error is harmless where there is overwhelming evidence of defendant's guilt].) Eyewitness testimony and surveillance video consistently demonstrated that appellant had assaulted Morales and Lopez with his vehicle and fled the scene. Appellant's counsel's declaration, which states that four jurors believed appellant was under the influence of marijuana and that this impacted the verdict, was inadmissible. (Evid. Code, § 1150, subd. (a) [statements regarding jurors' thought processes are inadmissible]; *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261.) For these reasons, we find no prejudicial error with respect to the admission of marijuana-related evidence in this case.

II. The Trial Court Did Not Err in Refusing to Instruct on Self-Defense.

Appellant also argues the trial court erred in refusing to instruct the jury on self-defense. We disagree.

There is no error in the refusal to provide a requested jury instruction if that instruction is not supported by substantial evidence. (*People v. Franco* (1994) 24 Cal.App.4th 1528, 1540.) As the trial court stated, a self-defense instruction was not warranted in this case because all of the trial testimony, including that of the defense witness Ayala, indicated appellant struck Morales and Lopez with his vehicle before Morales began punching him. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [self-defense may not be invoked by defendant who, through his own wrongful conduct (e.g., initiation of a physical assault), has created circumstances under which his adversary's attack is legally justified].) Because the theory of self-defense was not supported by substantial evidence, the trial court was correct in not instructing on that claim.

III. Remand For Reconsideration under S.B. 1393 is Warranted.

Effective January 1, 2019, S.B. 1393 amended Penal Code sections 667 and 1385 to give the trial court discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Under the versions of those statutes applicable when the court sentenced appellant, the court had no such discretion, but instead was required to impose a five-year consecutive term for any person convicted of a serious felony who previously had been convicted of a serious felony. (*Ibid.*)

"[I]t is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Respondent concedes S.B. 1393 applies retroactively to appellant's nonfinal case.

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so

that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) A remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*) We find no such indication here. Appellant and respondent agree, as do we, that remand is warranted to permit the trial court to exercise its discretion whether to strike the prior serious felony enhancement.

DISPOSITION

The convictions are affirmed. The case is remanded with directions to the superior court to decide whether to exercise its discretion to strike the prior serious felony enhancement pursuant to S.B. 1393. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 34-35; Pen. Code, § 1260.) At the remand hearing, appellant shall have the right to the assistance of counsel and, unless he chooses to waive it, the right to be present. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 258-260; *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255.) If the court elects to exercise its discretion, appellant shall be resentenced and the abstract of judgment amended.

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MANELLA, P.J.

We concur:

WILLHITE, J.

COLLINS, J.